Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al.,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioners Akron, Canton & Youngstown Railroad Company and the other 51 railroad companies and railroad trustees whose names for the purpose of brevity are set forth on Appendix A hereto[1] (said Appendix being incor-

1. Because the appendices required to be appended to this Petition are voluminous they are separately presented as "Appendices to Petition for Writ of Certiorari". The pages of each Appendix are separately numbered by reference to the letter in its heading.

porated herein by reference), all of whom were defendants below, collectively pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (sometimes herein referred to as the "Ninth Circuit") dated and entered in this case on August 28, 1975 (Appendix B hereto), and the Amended Opinion on which said judgment is based, affirming a judgment of the United States District Court for the Northern District of California which granted Respondents Pacific Fruit Express Company and Interstate Commerce Commission injunctive relief against Petitioners.

OPINIONS BELOW

The Opinion (Memorandum of Decision) of the District Court, dated March 2, 1973 (Appendix C hereto), which granted injunctive relief to Respondents Pacific Fruit Express Company and Interstate Commerce Commission, is reported at 355 F.Supp. 700 (1973). The Amended Opinion[2] of the Circuit Court of Appeals for the Ninth Circuit (Appendix D hereto) has not yet been officially reported.

JURISDICTION

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix D) was filed as of August 28, 1975 and that Court's judgment in this case

2. The reasons why there is an Amended Opinion are as follows: On August 28 1975 the Ninth Circuit filed its original Opinion and filed and entered its judgment. In that Opinion several erroneous statements were inadvertently made concerning one of the contentions of Petitioner Railroads. A timely petition for rehearing was filed which simply requested that the Opinion be modified to correct those errors. Accordingly, the Amended Opinion making the requested modifications was filed *as of* the same date, August 28, 1975. The time for filing this petition is computed from that date.

(Appendix B) was filed and entered on that date. This petition for writ of certiorari is being filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does Section 1(14)(b) of the Interstate Commerce Act (49 U.S. § 1(14)(b)), which requires that protective service contracts between railroad common carriers and third parties covering interstate shipments of perishables be submitted to and approved by the Interstate Commerce Commission, empower the Commission or the courts to require intermediate and terminating railroad carriers to enter into mechanical protective service contracts with respect to joint movements of perishables as to which there is such an approved contract between the originating carrier and the carline?

STATUTES INVOLVED

1. United States Code, Title 49, Section 1(13) (Interstate Commerce Act, Section 1(13)).
2. United States Code, Title 49, Section 1(14)(a) (Interstate Commerce Act, Section 1(14)(a)).
3. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).
   (The text of the listed statutes are set forth in Appendix G hereto).

STATEMENT OF THE CASE

On December 30, 1965 Respondent Pacific Fruit Express Company (herein referred to as "PFE") commenced this action to recover damages from Petitioners (herein referred to as "Petitioner Railroads") and a number of other railroads. The basis of jurisdiction of the District Court

was alleged to be 28 U.S.C. §§ 1331, 1332, 1337 and 1398. In the original and six amended and supplemental complaints an aggregate recovery in excess of $12,500,000 was sought, the basis of the damage claims being that under an order of Respondent Interstate Commerce Commission (herein referred to as "the Commission") made on August 27, 1962 in a proceeding known as *Ex Parte No. 137* (which order is reported at 318 I.C.C. 111 and is herein referred to as "the Commission's 1962 order," a copy being Appendix H hereto) each of Petitioner Railroads was obligated to pay its proportionate share of the annual deficits incurred by PFE in furnishing mechanical protective service to the railroad industry. Petitioner Railroads filed answers denying liability.

On June 18, 1970 PFE filed a motion for summary judgment on the liability issue. Petitioner Railroads filed opposing affidavits and also motions (1) for judgment on the pleadings because the subject matter of the action was within the exclusive jurisdiction of the Commission or, alternatively, (2) for a stay of the action and reference to the Commission because the subject matter was within its primary jurisdiction.

By orders dated November 16, 1971 and January 20, 1972 the District Court referred to the Commission certain questions which it considered to be within the primary jurisdiction of the Commission. On March 8, 1972 the Commission transmitted its Report and Order (Appendix E hereto) replying to the District Court's questions (340 I.C.C. 754).

A request for injunctive relief became a part of the case on April 28, 1972 when PFE by an amendment to its Fifth Amended Complaint included as Count II a cause of action for an injunction. The amendment added the Commission

and Respondent United States of America (herein referred to as "the United States") as defendants in that count, which sought an injunctive order requiring Petitioner Railroads to comply with the Commission's 1962 order. The basis of jurisdiction of the District Court on that count was alleged to be 28 U.S.C. §§ 1336, 1398 and 2321. Petitioner Railroads filed answers denying the charging allegations. On July 21, 1972 the Commission filed a motion to intervene as a plaintiff and to file a complaint for an injunction, the proposed complaint parallelling PFE's injunctive count and on September 27, 1972 the United States filed a motion to be realigned as a plaintiff. These motions were granted.

On August 9, 1972 PFE filed a motion for summary judgment on the injunction issue. Petitioner Railroads filed opposing affidavits raising factual questions together with a memorandum in opposition to the motion. At the hearing of November 3, 1972 on PFE's motion for summary judgment for an injunction the Commission orally joined in the motion and was permitted to do so.

On December 11, 1972 the District Court entered a brief order granting (1) the PFE motion for summary judgment on the liability issue (but reserving determination of the damage issue) and (2) the motions of PFE and the Commission for injunctive relief. The order recited that a Memorandum containing the background of the litigation and findings and conclusions would be issued in due course. Accordingly on March 2, 1973 the District Court issued its opinion entitled "Memorandum of Decision" (Appendix C) setting forth its reasons for, and its findings of fact and conclusions of law in connection with, its order granting the summary judgments. On March 7, 1973 the District Court made and entered its Judgment and Order on the injunction issue (Appendix F hereto).

An appeal was noticed on May 1, 1973 by Petitioner Railroads pursuant to 28 U.S.C. § 1292(a)(1) "from the injunctive relief" granted by the District Court's judgment. The appeal was limited to the injunctive aspect, since there is no final decision of the District Court on the liability and damage aspect which is appealable.

Turning to the factual background of the case, PFE is a carline company owned in equal shares by Southern Pacific Transportation Company and Union Pacific Railroad Company (herein respectively referred to as "S.P." and "U.P."). PFE is not a common carrier by railroad. *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968). PFE owns or leases in excess of 10,000 mechanical refrigerator cars which it furnishes to common carriers for the transportation of perishables. Petitioner Railroads are common carriers by rail, generally operating in the Eastern, Southern and Midwestern parts of the country, east of the railroad gateway points of Omaha, Council Bluffs, Kansas City and Chicago.

The basis of PFE's case is that under the Commission's 1962 order (Appendix H) each of Petitioner Railroads became obligated to enter into contracts for mechanical protective service with PFE and to pay PFE its proportionate share of the annual deficits incurred by PFE in furnishing such service to the railroad industry. As to injunctive relief, the claim is founded on the assertion that Petitioner Railroads are in violation of the Commission's 1962 order because they did not enter into such contracts with PFE.

The mechanical refrigeration cars of PFE contained, as component parts, mechanical refrigeration units which were used to provide protective service to shipments of perishables. This case does not involve any controversy with respect to the refrigerator *cars*, as distinguished from the

mechanical refrigeration *units*. "Car service" is covered by Section 1(14)(a) of the Interstate Commerce Act (herein referred to as "the Act").[3] The subject matter of this case is limited to the furnishing of the mechanical refrigeration units and to "protective service against heat or cold" to property transported in interstate commerce, the latter subject being covered by Section 1(14)(b) of the Act. That section, the text of which is set forth in full in Appendix G, makes it unlawful for any common carrier by rail to enter into any contract with any person for the furnishing to such carrier of such protective service "unless and until such contract, agreement or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest . . ."

With respect to the movements of perishables in PFE mechanical refrigerator cars which this case involves the following is the factual background:

1. Those movements are eastbound shipments as to which S.P. and U.P., the parents of PFE, are the originating carriers and Petitioner Railroads are intermediate or terminating carriers.

2. As common carriers, railroads are obligated to provide shippers protective service for perishable freight. As between railroads participating in a joint movement of perishables, the originating carrier has the duty of providing the refrigerator cars to the shipper and making the choice of what cars shall be used.

3. Thus, the decision to select and use PFE mechanical refrigerator cars in the perishable movements involved in this case was made by PFE's parent companies, as originating carriers. Petitioner Railroads, being intermediate

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3. The Interstate Commerce Act is embodied in Title 49 of the United States Code, the numbers of the sections of the Act and of the title being identical.

or terminating carriers, had no voice in such decision and selection. When the PFE cars were tendered at interchange points to Petitioner Railroads, they were compelled, as common carriers, to accept the PFE cars for movement over their lines provided only that they were in safe operating condition.

4. While the PFE cars were on the lines of Petitioner Railroads all inspection, starting, stopping, regulating, fueling, repairing and other servicing relating to the operation of the units was performed by Petitioner Railroads or by third parties engaged by them. All services, functions and obligations with respect to the PFE cars and their mechanical refrigeration units at interchange points which were required by the rules of the National Perishable Freight Committee were performed by Petitioner Railroads or their contractors, and not by PFE.

5. PFE neither furnished nor performed any services whatever on its mechanical refrigeration units while they were on the lines of Petitioner Railroads. In the territories served by Petitioner Railroads PFE had no employees, facilities or means of furnishing or performing any servicing of any equipment of any kind to or for any of Petitioner Railroads. Consequently, Petitioner Railroads were compelled to perform such servicing themselves or through their contractors.

Turning to the background for the Commission's 1962 order,[4] that order arose out of a general investigation undertaken by the Commission in 1959 as to the reasonableness of charges for mechanical protective service under contracts requiring Commission approval under Section 1(14)(b), (318 I.C.C. 111-112, Appendix H hereto, p. H-2). By its 1962 order the Commission prescribed provisions to be included in all mechanical protective service contracts which were submitted to it for approval. Those prescribed conditions were incorporated by the Commission in regulations included in the Code of Federal Regulations and published in the Federal Register.[5]

4. The validity of the Commission's 1962 order is the subject matter of an action now pending before a three-judge court convened pursuant to 28 U.S.C. § 2284 in the District Court for the District of Columbia. That action, *Southern Railway Company, et al., v. United States*, Civil No. 1776-73, has been under submission on the merits since May 27, 1975. The plaintiffs in that action are some of Petitioner Railroads in this case.

In the concluding paragraphs of its 1962 order the Commission found that the unapproved protective service contracts which were before it were just and reasonable, provided that within 120 days the railroads filed new or superseding contracts consistent with the regulations adopted by the Commission and referred to above. The paragraph further provided as follows:

> "In the event new or superseding contracts are not filed, *further consideration will be given to the issuance of an order* finding the presently unapproved contracts not within the requirements of section 1(14)(b)."
>
> (318 I.C.C. 127, Appendix H. hereto, p. H-27; emphasis added)

It is conceded that no such further order has ever been made.

Paragraph (a) of the Commission's regulations set forth in Appendix G to the 1962 order contained the following final sentence:

> "The contracts required herein to be filed shall supersede all prior contracts, *including Division Sheet 7,*

5. See Appendix G to 1962 order, 318 I.C.C. 137-138 (Appendix H hereto, p. H-39); 49 C.F.R. § 1032.2; 27 F.R. 9406, September 21, 1962.

and such contracts and those filed thereafter shall conform in substance to the provisions set forth in subsections (b), (c), (d), (e), (f) and (g)."

(318 I.C.C. 138, Appendix H hereto, p. H-40)

Since the Commission's 1962 order Petitioner Railroads have continued to observe and comply with Division Sheet 7. They have not entered into mechanical protective service contracts with PFE for a variety of reasons, including the following: (1) that as intermediate or terminating carriers they, as distinguished from the originating carriers (S.P. and U.P., the parents of PFE), do not have any relationship with PFE which requires such contracts; (2) that the furnishing of a mechanical protective unit is not the furnishing of mechanical protective service within the contemplation of Section 1(14)(b) of the Act; and (3) that Division Sheet 7 was filed with the Commission, was conditionally approved by the 1962 order and that no further order has ever been made by the Commission setting aside that conditional approval, as provided for in the Commission's order.

On the other hand, S.P. and U.P., the originating carriers of the perishable shipments involved in this case, did enter into a protective service contract with PFE on June 5, 1963 (effective January 1, 1964) which covered mechanical protective service. That contract was approved by the Commission pursuant to Section 1(14)(b) on September 9, 1963 and remained in effect during the period covered by the complaints. But PFE's parents have not entered into protective service contracts with any other of the nation's carlines covering shipments in which they, like Petitioner Railroads, are intermediate or terminating carriers rather than originating carriers.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Holding That the Commission's 1962 Order Either Established a Contractual Relationship, or Ordered That One Be Entered Into, Between Petitioners and PFE, Exceeds the Congressional Grant of Authority Provided in Section 1(14)(b) of the Act and Decides an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The decision below, in holding that there was a contractual relationship, or that such a relationship was required to be entered into, between Petitioner Railroads and PFE requiring mechanical protective contracts between them under Section 1(14)(b) of the Act, is without foundation in law and is an unwarranted interpretation of that section. In so holding, the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

As a consequence of the decisions of the District Court and the Ninth Circuit in this case, the railroad industry of this country is now confronted with a series of lawsuits by other carlines and companies furnishing refrigerator cars containing mechanical refrigeration units. Such suits, commenced in a number of district courts, are founded on the identical premises involved in the present case and seek injunctions and the recovery of many millions of dollars. It is essential, for the conservation of judicial time and energy and the establishment of uniformity of decision, that this Court assume jurisdiction of this case and settle the question as to the meaning and effect of Section 1(14)(b). This Court has not previously considered and ruled on the question.

The primary facts relating to the use of PFE refrigerator cars and mechanical protective units by Petitioner Railroads were found by the Ninth Circuit to be as follows:

> "The use of PFE cars on appellants' lines is occasioned by the fact that Union Pacific and Southern Pacific, as originating carriers on eastbound shipments, select these PFE cars to transport perishables to the East. Appellant railroads as common carriers are required by law to accept, and do accept, such cars at interchange points to transport perishables over their respective lines to ultimate destinations. The mechanical units in the refrigerated cars are used by appellants to supply MPS."
>
> (Amended Opinion, Appendix D, p. D-4)

Virtually identical findings were made by the District Court (Memorandum of Decision, Appendix C, p. C-2).

It is undisputed that U.P. and S.P., the originating carriers of the perishable shipments involved in this case, had entered into a contract with PFE on June 5, 1963 (effective January 1, 1964) which covered mechanical protective service and which applied to these shipments of perishables. On September 9, 1963 that contract was approved by the Commission pursuant to Section 1(14)(b) and it remained in effect over the years covered by PFE's complaints in this case.

The District Court's Judgment and Order which has now been affirmed by the Ninth Circuit commanded Petitioner Railroads to enter into mechanical protective service contracts with PFE and to submit such contracts to the Commission for approval under Section 1(14)(b) (Appendix F, p. F-3). Having in mind (1) that Petitioner Railroads were intermediate or terminating carriers with respect to the perishable shipments here involved and (2) that the

originating carriers of such shipments, who selected and obtained from PFE the cars and units used in such shipments, had in effect a protective service contract with PFE which had been approved by the Commission pursuant to Section 1(14)(b), the question is presented whether in such circumstances Section 1(14)(b) empowers the Commission or the courts to require that these intermediate and terminating carriers enter into mechanical protective service contracts with PFE.

In the Amended Opinion the Ninth Circuit considered Petitioner Railroads' contention that there was no relationship between them, as intermediate and terminating carriers, and PFE which brought Petitioner Railroads within the purview of Section 1(14)(b). The Ninth Circuit disposed of the contention by this pronouncement:

> "We are satisfied that the effect of the ICC order, whether it established a contractual relationship, or merely ordered that a contractual relationship be entered into, has the effect of placing the parties in such relationship to one another as to permit enforcement under § 16(12)."
>
> (Amended Opinion, Appendix D, p. D-10)

The obvious effect of this holding is to read into the limited Congressional grant of authority embodied in Section 1(14)(b)—which is only that of approval of protective service contracts—the additional but unauthorized grant of command—the power to require the making of protective service contracts.

Section 1(14)(b)[6] is a very limited statute. By its provisions all that it does is to make it unlawful for any com-

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6. Section 1(14)(b) was added to the Act by the Transportation Act of 1940 (54 Stat. 898, 76th Cong. 2d Sess. Chap. 722; September 18, 1940), which embodied a number of amendments and

mon carrier by railroad to enter into any protective service contract with any person

> ". . . unless and until such contract, agreement or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest . . ."[7]

To point up the narrow scope of this statutory authorization with respect to protective service contracts, a comparison may be made with Sections 1(13) and 1(14)(a), relating to "car service." By Section 1(13) the Commission is authorized to require, by general or special orders, all rail carriers to file their rules and regulations with respect to car service. But beyond that, Section 1(14)(a) authorizes the Commission, after hearing, to "establish reasonable rules, regulations, and practices with respect to car service . . . including the compensation to be paid and any other terms of any contract, agreement or arrangement for the use of any locomotive, car or other vehicle . . ."[8]

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revisions of the Interstate Commerce Act which had been under consideration by the Congress in the late thirties. The addition of Section 1(14)(b) was not proposed in the original House or Senate bills, and it first appeared in a Conference Committee report of April 26, 1940 (Conference Report, Transportation Act of 1940; H. Rept. 2016, 76th Cong. 3d Sess., House Misc. Repts. Vol. II, p. 60; April 26, 1940). Congress could not have had mechanical protective service in mind when it adopted Section 1(14)(b) in 1940, because at that time there was no such thing. As the Commission pointed out in its 1962 order, prior to 1953 protection of perishables from heat or cold required the supplying of ice and salt to the refrigerator cars and of fuel to car heaters. As late as December 1959 three principal carlines had a fleet of 22,000 refrigerator cars, of which only 1,200 were mechanically refrigerated.

7. For the full text of Section 1(14)(b) see Appendix G, p. G-1-2).

8. Sections 1(13) and 1(14)(a) are set forth in full in Appendix G, p. G-1).

Thus, as to "protective service" the Commission's authority is merely to approve; as to "car service" it has been granted the authority to command. These differences in the Congressional grants of authority with respect to "protective service", on the one hand, and "car service", on the other hand, are not inadvertent. As this Court pointed out in construing other sections of Section 1 of the Act, Congress in enacting the various provisions of Section 1 "drew a distinction between what might be permitted and what compelled." *I.C.C. v. Oregon-Washington R. Co.*, 288 U.S. 14, 37 (1933).

This Court has recognized that there is a crucial distinction between the power of the Commission to approve an agreement which has been voluntarily entered into by a railroad and the power to require such an agreement. Thus, in *St. Joe Paper Co. v. Atlantic Coastline R. Co.*, 347 U.S. 298, 310 (1953) there was under consideration the authority of the Commission under Section 5 of the Act with respect to merger agreements. The Commission proposed to a district court a plan of reorganization under which a railroad involved in reorganization proceedings would have been compelled to merge with another railroad. This Court held that

> ". . . the very heart of § 5 is that a merger of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal by the merging carriers."
>
> (347 U.S. 310)

This same distinction between the power of the Commission to approve and the power to command was recognized in *Neisloss v. Bush*, 293 F.2d 873, 878 (D.C.Cir. 1961), which also involved the Commission's authority under Section 5

of the Act with respect to the approval of mergers. Mr. Justice Reed, sitting by designation in that case, said this:

> "However, we find in that section only an authorization for the Commission to consider and approve transactions of the nature of those here at issue. There is no language of command in the section . . ."
>
> (293 F.2d 878)

The Amended Opinion ignores the distinction between the power to approve and the power to command. It converts the power to approve protective service contracts granted under Section 1(14)(b) into the power to command entry into such contracts. When Congress considered it appropriate to do so, as with respect to car service in Section 1(14)(a), it has included in the Act language granting the power to command. But it did not grant that power in Section 1(14)(b).

CONCLUSION

This Court has never considered or given guidance on the effect of the provisions of Section 1(14)(b) of the Act. Yet its decisions in *Oregon-Washington R. Co.* and in *St. Joe Paper Co., supra,* indicate that in determining the scope of authority granted by various sections of the Interstate Commerce Act the distinction between the power to approve and the power to command has been recognized and enforced. In the interests of justice, the effective administration of the federal judicial system, and the conservation of judicial time and energy this Court should grant certiorari

in order to settle the important question of federal law presented in this petition.

Dated: November 24, 1975.

Respectfully submitted,

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(Appendices Follow)